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ABSTRACT

The government is a special employer that operates under the guidelines of the United States Constitution. Under these guidelines, government may not, without adequate justification, (1) deprive its citizens of fundamental, protected rights such as the freedoms of speech and association; (2) deprive a citizen of property or liberty without the due process of law; or (3) deny any citizen the equal protection of the laws. A public employee may not be discharged for expressing ideas on a matter of legitimate public concern unless the courts decide that the resulting harm done to the workplace overrides the employee's interest in free expression. Jobs are considered to be property under the Constitution and cannot be taken away without due process of law. For all public employees, the enjoyment of a good reputation is a liberty interest that also requires due process to be taken away. Equal protection of the laws is a constitutioanl right that prohibits sex and race discrimination. (GJ)

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A Legal Memorandum

FEBRUARY 1986 National Association of Secondary School Principals ISSN 0192-6152

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CONSTITUTIONAL PROTECTIONS OF TEACHERS AND OTHER PUBLIC EMPLOYEES

Introduction

The government is a special employer. The people it hires stand not only in an employer-employee relationship but also in a government-citizen relationship. One chief reason that our Constitution sets out the powers and privileges of government is the need to protect citizens from the overbearing power of the government. While the authors of the Bill of Rights surely could not have foreseen that fired public employees might use it to get their jobs back, such employees are citizens and therefore are entitled to the protections of the Bill of Rights and the entire Constitution.

A public school system is part of the government. When the school becomes an employer, the constitutional guidelines that limit the ways in which government may deal with its citizens apply to the school's dealings with its employees.

Chiefly, these guidelines apply in the following ways: Government may not, without adequate justification, (1) deprive its citizens of fundamental, protected rights like freedom of speech and freedom of association; (2) deprive a citizen of property or liberty without due process of law; and (3) government must provide all citizens the equal protection of the laws.

Protection of Fundamental Rights

The First Amendment to the United States Constitution guarantees to all citizens the rights to freedom of speech and freedom of association. If an employee of a public school is forced to choose between keeping his job and exercising one of these rights, the government has done to him indirectly what it may not do directly--it has put him to such a hard choice that it has deprived him of a constitutionally protected right. The courts, led by the United States Supreme Court, have made it clear that indirect deprivation is just as unconstitutional as direct.[1]

Pickering v. Board of Education[2] is the leading case in this area. Pickering, a teacher, had been dismissed for writing a letter to the editor critical of several actions by the local school board. The lower courts had upheld the dismissal because the letter was "detrimental to the interests of the school system."[3] The United States Supreme Court reversed the lower

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courts' decisions, which it characterized as "suggest[ing] that teachers may constitutionally be compelled to relinquish the First Amendment rights they would otherwise enjoy as citizens to comment on matters of public interest...."[4] It went on to say:

> [T]he theory that public employment which may be denied altogether may be subjected to any conditions, regardless of how unreasonable, has been uniformly rejected.[5]
>
> ....
>
> [S]tatements by public officials on matters of public concern must be accorded First Amendment Protection despite the fact that the statements are directed at their nominal superiors.[6]

Since Pickering, decided in 1968, the courts have frequently looked favorably on the claims of public education employees who were dismissed because of their exercise of First Amendment rights: In one case,[7] a professor of government and science at a public junior college in Texas had testified on several occasions before committees of the state legislature about matters of interest to his school's board of regents and had become embroiled with the board over a number of controversial issues. His contract was not renewed. The Supreme Court remanded the case to the trial court for a determination of whether the dismissal was based on the teacher's testimony and other public statements critical of the regents' policies or on some other reason that did not involve constitutional rights.

Another case[8] involved an English teacher in a junior high school that was under a desegregation order. On several occasions she privately told her principal about her views regarding desegregation. When her contract was not renewed she sued. The appeals court threw out her lawsuit on the ground that "because petitioner had privately expressed her complaints and opinions to the principal, her expression was not protected under the First Amendment."[9] Only public speech is protected, the court held. The United States Supreme Court overuled the appeals court, saying that freedom of speech is not "lost to the public employee who arranges to communicate privately with his employer rather than to spread his views before the public."[10]

Other examples abound. In one case,[11] an instructor in a technical institute submitted a memorandum to her superiors in which she stated that the administration showed a "lack of concern for students" and was not adequately responding to the community. The federal appeals court held that her memorandum was due First Amendment protection: "Such broadly-based comments are protected as general criticism of a public institution."[12] In another case,[13] the appeals court ruled that a teacher's right of free speech had been violated when his contract was not renewed after he had written a letter to the editor of the local newspaper denying he had advocated doing away with his school's track program. The teacher was awarded $10,000 in damages. In other cases,[14] vocal support for teacher organizations has been held to be constitutionally protected.

But all of these courts have recognized that the rights of the public employee to speak out are not limitless: In Pickering the Court said:[15]

> [T]he State has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general. The problem in any case is to arrive at a balance between the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interests of the State, as an employer, in promoting the efficiency of the public services it peforms through its employees.

The balance is truck by comparing the importance of the employee's speech with the harm it causes in the workplace. If the employee is speaking out on a matter of public concern and does not interfere significantly with his ability to do his job or the ability of others to do theirs, the balance will probably be struck in his favor. But if the same speech impedes the government agency's work, the balance may be struck differently.[16] And, because the purpose of First Amendment protection is to have "free and unhindered debate on matters of public importance,"[17] where the employee's speech is about matters not of general public concern, the balance is easily struck in the employer's favor.[18]

The most recent case on this subject to reach the U.S. Supreme Court, Connick v. Myers, was decided in 1983, and involved an assistant district attorney who was fired after circulating within the district attorney's office a questionnaire that protested the rotation procedure by which assistants were assigned to the different courts in the New Orleans system.[19] The Court said:

> [I]f Myers' questionnaire cannot be fairly characterized as constituting speech on a matter of public concern, it is unnecessary for us to scrutinize the reasons for her discharge....[W]hen a public employee speaks, not as a citizen upon matters of public concern, but instead as an employee upon matters only of personal interest...a federal court is not the appropriate forum in which to review the wisdom of a personnel decision taken by a public agency allegedly in reaction to the employee's behavior....[T]he First Amendment does not require a public office to be run as a roundtable for employee complaints over internal office affairs.[20]

Cases decided since Connick have indicated that the courts are having considerable difficulty in applying its holding.[21] In general, however, a public employee may not be discharged for expressing his or her ideas on a matter of legitimate public concern, even if the expression comes in a private conversation with the employer, unless the public employer's interest in the government's effective and efficient operation outweighs the employee's interest in free expression. Whether a particular expression is on a matter of public concern is the initial question. If it is not, the employer's interest prevails. If it is, the court must balance the interests. How directly does the expression affect the matter of public concern? How significant is the issue? How disruptive in the workplace was the expression, or is likely to be? Finally, even if the balance favors the employee, if the employer can prove that the discharge would have occurred anyway for reasons

unrelated to any exercise of protected First Amendment rights, the employer wins.[22]

Deprivation of Property

The Fourteenth Amendment to the United States Constitution says that the government, including public schools may not "deprive any person of life, liberty, or property, without due process of law...."

Because capital punishment is not among a school's personnel practices, we are not here concerned with the provision regarding deprivation of "life." But we are very much concerned with the other two elements: deprivation of property and deprivation of liberty. First, property.

People readily understand that a citizen may not be deprived of property without due process when the matter arises in certain situations. It makes sense to us, for example, that elaborate condemnation proceedings, are required before a citizen's front yard can be taken in order to create a city park or a state road. But real estate is not the only kind of property citizens have, and condemnation is not the only kind of due process. As the United States Supreme Court said in Board of Regents v. Roth, "[T]he property interests protected by procedural due process extend well beyond actual ownership of real estate, chattels, or money....The Fourteenth Amendment's procedural protection of property is a safeguard of the security of interests that a person has already acquired in specific benefits. These interests--property interests--take many forms."[23] One of these "interests that a person has already acquired," the Court said, can be an interest in continued public employment. But "[t]o have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must, instead, have a legitimate claim of entitlement to it."[24] In Roth, the university professor was hired to teach on a one-year contract. The contract made no provision for renewal at all. In that circumstance, the court held, nonrenewal was not a deprivation of property: "[T]he respondent surely had an abstract concern in being rehired, but he did not have a property interest...[emphasis in original]."[25]

So if a public school employee can demonstrate that he has a "legitimate claim of entitlement" to his job, he has a "property interest" in his job, and that property may be taken away from him only through due process of law. The "legitimate claim" arises not in the Constitution but by some other law, ordinance, or policy, for instance, under some state statutes, state employees may be dismissed only for "just cause." They thus have a "legitimate claim" on their jobs, which may be taken away from them only through due process. In other cases, the legitimate claim may be created by contract, by federal statute,[24] or by city charter.[27] Classic examples of a "legitimte claim" in the school context are public school teacher tenure laws, which set out the causes for which teachers and principals may be dismissed.

What Constitutes Due Process? The point has been made repeatedly that the constitution forbids the deprivation of property without "due process." What is due process? Due process is the means by which a citizen is assured of

fair treatment by government. In the typical public employment case, an employee who is fired claims that the firing was without good cause and amounted to a deprivation of property. In such case, the U.S. Supreme Court recently said, the employee's due process consists, at a minimum, of "oral or written notice of the charges against him, an explanation of the employer's evidence, and an opportunity to present his side of the story before the employee is terminated.[28] Unfortunately, that characterization only hints at the complexity of what constitutes due process, and we cannot pursue that issue here.[29]

Deprivation of Liberty

Besides protecting people who are being deprived of property, the Fourteenth Amendment's due process requirement also protects people who are being deprived of liberty. "Liberty," like "property," has a broad meaning.

As one state supreme court has said, "[o]ne of the liberty interests encompassed in the Due Process Clause of the Fourteenth Amendment is the right to 'engage in any of the common occupations of life,' unfettered by unreasonable restrictions imposed by actions of the state or its agencies."[30] As the North Carolina Supreme Court summed it up:[31]

> [W]here [the government] publicly and falsely accuses a discharged employee of dishonesty, immorality, or job-related misconduct, considerations of due process demand that the employee be afforded a hearing in order to have an opportunity to refute the accusation and remove the stigma upon his reputation.

But the United States Supreme Court noted:[32]

> The purpose of such notice and hearing is to provide the person an opportunity to clear his name. Once a person has cleared his name at a hearing, his employer, of course, may remain free to deny him future employment for other reasons.

In an illustrative case,[33] a public school principal was told by a third person that the manager of the school cafeteria had brought liquor onto the school premises and distributed it to painters then working in the cafeteria. The principal fired the manager, who complained that the principal, after firing her, spread rumors about the liquor. The state supreme court held that the cafeteria manager had a valid claim that her constitutionally protected liberty interest had been violated:

> The right of a citizen to live and work where he will is offended when a state agency unfairly imposes some stigma or disability that will itself foreclose the freedom to take advantage of employment opportunities....[D]ue process demand[s] that the employee be afforded a hearing in order to have an opportunity to refute the accusation and remove the stigma upon his reputation. [Citations omitted.][34]

Since the purpose of the hearing is to offer the employee a chance to clear his name, in this case, the court said that the hearing may come even after the dismissal.

Equal Protection of the Laws

The two immediately preceding sections have focused on the Fourteenth Amendment's protections of property and liberty--that no citizen, including a public employee, may be deprived of either without due process of law. The Fourteenth Amendment contains another kind of protection. It provides that the government may not deny to any person--including public employees--"the equal protection of the laws."

A person who is denied public employment--or is denied a promotion or other job benefit--because of the application of some rule or classification may believe that he has been denied the equal protection of the laws. For example, the "rule or classification" might be that, in order to get a particular job, the applicant must pass a certain test or have a specific certificate. Generally, the equal protection guarantee does not deny public employers the power to use employment rules or classifications that inevitably give public employment benefits to some individuals or groups and not to others. So long as the rule or classification is rationally based, there is not ordinarily a constitutional problem.[35] If it is rational to require that a candidate pass a test for a certain job or hold a particular certificate before he may be employed, the requirement has not denied equal protection of the laws to those who fail the test or do not hold the certificate. A regulation that teachers may not wear mid-thigh skirts is another example of a rational requirement.[36]

But if the rule appears to demonstrate an intent to discriminate on the basis of race or sex, merely being rational will not save the rule from being unconstitutional. A requirement based on race "is presumptively invalid and can be upheld only upon an extraordinary justification."[37] Similarly, a classification "overtly or covertly designed to prefer males over females in public employment would require an exceedingly persuasive justification to withstand a constitutional challenge under the Equal Protection Clause of the Fourteenth Amendment."[38]

It is relatively easy to show that a rule is "rational." But it is very difficult to show that a requirement based on race or sex meets the "extraordinary justification" or "exceedingly persuasive justification" standard.

Before a public employer will be called upon to make such a showing, however, the person who challenges a classifiction as race-based or sex-based must demonstrate that it was developed with the intent to discriminate on the basis of race or sex and not merely that it may have had that effect. An example will illustrate the point.

Under a Masschusetts statute, all military veterans who had served in wartime and qualified for state civil service positions were granted a permanent preference over all nonveterans for the jobs. Because 98 percent of all veterans at that time were men, the adverse impact on women was obvious. Helen Feeney, not a veteran, brought a lawsuit claiming a violation of the equal protection clause. The Court noted that the "dispositive question" was the presence of "a gender-based discriminatory purpose" in the adoption of the rule.[39] Finding no such purpose, it held that the veterans-preference rule did not violate the equal protection clause.

These principles are reflected in United States v. South Carolina.[40] In that case it was charged that South Carolina's use of scores on the National Teacher Examination to certify and determine the pay levels of teachers in the state, had a clear adverse impact on blacks, denying black teachers and prospective teachers the equal protection of the laws. The trial court held, in an opinion affirmed by the United Sttes Supreme court, that the test was not used with the intent to discriminate and that "[i]n the absence of discriminatory intent, the classifications of teachers for both certification and pay purposes may be assessed under the 'rational relationship' standard...."[41]

Conclusion

The government is a special employer. A public employee, because he or she remains a citizen, may not be discharged for expressing ideas on a matter of legitimate public concern, unless the court determines that the governmental employer's interest in efficient and effective operation outweighs the employee's interest in free expression. For public employees with a "legitimate claim of entitlement" to their jobs--given to them by statute or ordinance or official policy--their jobs are their property and can be taken away only through due process of law (which basically means the opportunity to participate in a fair hearing). For all public employees, the enjoyment of a good reputation allowing them to "engage in any of the common occupations of life" is a liberty interest that also can be taken away only through due process. All public employees, as citizens, are entitled to the equal protection of the laws. Unequal treatment caused by an intent to discriminate on the basis of race or sex is a violation of the guarantee of equal protection.

FOOTNOTES

1. See Board of Regents v. Roth, 408 U.S. 564, 576 (1972).
2. 391 U.S. 563 (1968)
3. Id. at 565.
4. Id. at 568.
5. Id. at 568.
6. Id. at 574.
7. Perry v. Sindermann, 408 U.S. 593 (1972).
8. Givhan v. Western Line Consol. School Dist., 439 U.S. 410 (1979).
9. Id. at 413.
10. Id. at 415-16.
11. Daulton v. Affeldt, 687 F.2d 487 (4th Cir. 1982).

12. Id. at 491.
13. McGee v. South Pemiscot School District R-V, 712 F.2d 339 (8th Cir. 1983).
14. Hinkle v. Christensen, 733 F.2d 74 (8th Cir. 1984); Missouri National Education Association v. New Madrid County R-1 Enlarged School District, 606 F.2d (E.D.Mo. 1984).
15. 391 U.S. at 568.
16. In Jones v. Dodson, 727 F.2d 1329, 1334 (4th Cir. 1984), the court characterized the balance in the following way. If the expressive conduct touches matters of public concern "in only a most limited sense," a reasonable belief by the public employer that disruption will follow is enough. If the expressive conduct touches "directly upon matters of grave public concern," than even some degree of clear disruption may not justify discharge. Further, "[i]n making this balancing inquiry, the burden is upon the public employer to convince the court that the balance tips in favor of the government interest."
17. Pickering, 391 U.S. at 573.
18. Whether the speech is of a kind that merits First Amendment protection is a question of law for the court to decide. See Kim v. Coppin State College, 662 F.2d 1055 (4th Cir. 1981). Whether otherwise protected speech is "disruptive" or otherwise interferes with the government's work is a question for the jury.
19. Connick v. Myers, 461 U.S. 138 (1983).
20. Id. at 146, 147, and 149.
21. See for example Knapp v. Whitaker, 757 F.2d 827 (7th Cir. 1985), cert. denied, 54 U.S.L.W. 3221 (1985) and Ferrara v. Mills, 596 F.Supp. 1069 (S.D.Fla.).
22. A good summary is found in Jones v. Dodson, 727 F.2d 1329 (4th Cir. 1984).
23. 408 U.S. 564, 571-72, 576 (1972).
24. Id. at 577.
25. Id. at 578.
26. Arnett v. Kennedy, 416 U.S. 134 (1974), reh. denied, 417 U.S. 977 (1974).
27. Poolaw v. City of Anadarko, 660 F.2d 459 (19th Cir. 1981); but see Bishop v. Wood, 426 U.S. 341 (1976).
28. Cleveland Bd. of Educ. v. Loudermill, 53 L. W. 4306 (March 19,. 1985).
29. For a more detailed discussion of the due process in the student context see NASSP Legal Memorandum, "The Meaning of Fairness in Student Disciplinary Procedures," January, 1982.
30. Presnell v. Pell, 298 N.C. 715, 724 (1979), citations omitted.
31. Id. at 724.
32. Board of Regents v. Roth, 408 U.S. 564, 573, n. 12 (1972).
33. Presnell v. Pell, 298 N.C. at 715.
34. Id. at 724.
35. See Personnel Adm'r v. Feeney, 442 U.S. 256, 276 (1979).
36. Tardif v. Quinn, 545 F.2d 761 (1st Cir. 1976).
37. Personel Adm'r, 442 U.S. at 272.
38. Id. at 273.
39. Personnel Adm'r, 442 U.S. at 276.
40. 445 F. Supp. 1094 (D.S.C. 1977), aff'd, 4324 U.S. 1026 (1978).
41. Id. 445 F. Supp. 1107.

This Legal Memorandum was contributed by Robert P. Joyce, assistant director of the Institute of Government at the University of North Carolina at Chapel Hill, and is based upon an article he prepared for the Institute's School Law Bulletin.

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